No. 739

Office Supreme Court, U.S.
FILED
JAN 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. Misc.

In the Matter of the Application of

JOHN MIGUEL AND RALPH BROWN,

Petitioners,

FOR AN ORDER

—against—

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AND FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,

Respondents.

Pursuant to Article 78, Civil Practice Act

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT
AND
MOTION FOR STAY ORDER

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Respondents.

Pursuant to Article 78, Civil Practice Act

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT

MOTION FOR STAY ORDER

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioners, John Miguel, and Ralph Brown, having this day filed their petition for a Writ of Certiorari, a copy of which is hereto annexed, moves the Court for an order staying the respondents and each

of them from taking any further steps in the prosecution and trial of the petitioners under the above identified indictments pending final disposition of this case by the Court.

1. On June 14, 1963, petitioners made application to the Appellate Division of the Supreme Court of the State of New York for the First Department for an order staying the respondents and each of them herein from taking any further steps in the prosecution and trial of the defendants in pursuance of Article 78 of the Civil Practice Act of the State of New York (now Article 78 of the Civil Practice Law and Rules of said state). This application was dismissed on July 11, 1963.

2. On September 30, 1963, the petitioners moved in pursuance of Article 56 of the Civil Practice Law and Rules of the State of New York for leave to appeal from the aforesaid order entered on July 11, 1963, by the Appellate Division of the Supreme Court for the First Department. This motion was denied by the Court of Appeals, by order entered on October 31st, 1963.

3. The petitioners are respectively under separate indictments for allegedly independent violations of the anti-narcotic statute of the State of New York (Penal Law, section 1751). Each claims that he was arrested and subjected to an illegal search and seizure without probable cause and contrary to his privilege against self-incrimination and in violation of his guarantees to due process of law and the equal protection

of the laws as provided by section 1 of the Fourteenth Amendment. The petitioners moved before the Supreme Court of the State of New York for a hearing upon that issue and related relief. These motions were denied without prejudice to applications to renew upon condition that each petitioner furnish a sworn statement therein in pursuance of section 813-c of the New York Code of Criminal Procedure setting forth his version of his arrest and the accompanying search and seizure.

This requirement was the subject matter of the proceeding brought subsequently in the Appellate Division of the Supreme Court for the First Department to stay any further steps in the prosecutions and trials of the petitioners upon the ground that such an affidavit would deprive each of said petitioners of due process and the equal protection of the laws under section 1 of the Fourteenth Amendment through the incorporation therein of the privilege against self-incrimination as combined with the guarantee against arrest and search and seizure without probable cause, and would further deprive the petitioner of their aforesaid rights under section 1 of the Fourteenth Amendment upon the grounds that said section should be construed upon principle to incorporate the privilege against self-incrimination independently of its relation to, or combination with, the guarantees against arrest and search and seizure without probable cause. The jurisdiction of this court to allow the writ is based upon 28 USCA section 1257 (3). The questions presented are whether section 813-c of the New York Code of Criminal Procedure violates section 1 of the Fourteenth Amendment as a result of

the judicial construction thereof which requires each petitioner to furnish a sworn statement as to the facts of his arrest and the accompanying search and seizure; and whether Article 78 of the New York Civil Practice Law and Rules is *pro tanto* unconstitutional under section 1 of the Fourteenth Amendment for not supplying a preventive remedy against such requirement in the absence of final judgment, and whether Article 6 section 7 of the Constitution of the State of New York and Article 56 of the New York Civil Practice Law and Rules are *pro tanto* unconstitutional under section 1 of the Fourteenth Amendment for not conferring mandatory jurisdiction upon the New York Court of Appeals to determine whether the dismissal by the Appellate Division of the Supreme Court of the proceeding under Article 78 of the New York Civil Law and Rules, was erroneous. As more fully shown by the copy of the petition for the writ of certiorari hereto appended the privilege against self-incrimination is destroyed when a person is compelled to answer any question with respect of, or in anywise related to, an inquiry by or on behalf of the United States or any state in the Union for which he may be penalized or punished and or harassed by that or any other of their governments. That proposition has authoritatively been established for the virtually identical national and state constitutional privileges against self-incrimination in the a fortiori precedents protecting witnesses who were not under indictment. (*Counselman v. Hitchcock*, 142 US 547 [1892]; *Matter of Doyle*, 257 NY 244 [1931].).

4. A stay of any further steps in the prosecutions and trials of the indictments herein is essential to the preservation of the *status quo* concerning the rights of the petitioners until the same can be finally determined by this court. Unless a stay of further prosecutions and trials of the indictments is granted, petitioners will be irreparably injured, in that their privilege against self-incrimination as combined with their right to be free from illegal arrest and search and seizure will be destroyed despite the inclusion of said privilege and right within the guarantees of due process of law and the equal protection of the laws provided by section 1 of the Fourteenth Amendment; and their privilege against self-incrimination will likewise be destroyed despite its prospective and potential inclusion independently within the aforesaid guarantees provided by section 1 of the Fourteenth Amendment.

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To Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioners, John Miguel and Ralph Brown, respectfully pray that a Writ of Certiorari be issued to review the decision of the Appellate Division of the Supreme Court for the First Judicial Department of the State of New York entered on the 11th day of July, 1963.

Judgment and Opinion of the Court Below

On October 31, 1963, the Court of Appeals for the State of New York denied the motion of petitioners for Leave to Appeal from an order of the Appellate Division of the Supreme Court of the State of New York entered July 11th, 1963, dismissing the proceeding brought by the petitioners in pursuance of Article 78 of the Civil Practice Act of the State of New York for an order prohibiting, enjoining and restraining the respondents and each of them from taking any further steps in the separate prosecutions and trials of the petitioners under Indictment No. 287, for the year 1963, and Indictment No. 288-1963. Neither the Court of Appeals nor the Appellate Division rendered an Opinion.

The decision of the Court of Appeals and the order of the Appellate Division are printed in the Appendix.

Jurisdictional Statement

On January 24, 1963, each petitioner was separately arrested and subjected simultaneously in conjunction with their respective arrests to a search of their persons and alleged seizure from their alleged possession of narcotics by officers of the State of New York in the admitted absence of any warrant for either the arrest of the defendants or for the search and seizure aforesaid.

Your petitioner, John Miguel, was indicted under No. 287 on March 14, 1963, for the alleged unlawful possession of one-eighth of an ounce of heroin.

Your petitioner, Ralph Brown, was indicted under No. 288, on March 6th, 1963, in accordance with the First Count for the alleged possession of heroin with intent to sell and in accordance with the Second Count for the alleged unlawful possession of one-eighth of an ounce of heroin. On May 28th, 1963, petitioners' separate applications were denied by the Supreme Court of the State and County of New York for an order to inspect the Grand Jury Minutes, for the suppression of the narcotics and accessories allegedly seized, and for a preliminary hearing to determine whether the respective arrests of each petitioner and the accompanying searches and seizures lacked probable cause. The ground for the denials of their respective motions was that neither petitioner had submitted an affidavit raising issues of fact in regard to the question of probable cause as required by the judicial interpretation of Section 813-c of the New York Code of Criminal Procedure as a condition precedent for a preliminary hearing. Illustrative of the character of that section is the final subparagraph thereof which gives the defendant the alternative, in the event that his motion is denied, of pleading guilty in order to have the existence of probable cause determined upon appeal.

The further ground for the denial to the petitioners of their applications to inspect the Grand Jury Minutes was the prior adjudication by the New York Court of Appeals upholding the discretion of the Justice of the Supreme Court, to whom such application was made, to deny or grant the right to make such inspection, in the absence of any and all jurisdiction in the Court of Appeals to review the exercise of discretion by that Justice subsequently, either

before or after the trial and conviction of the defendant.

The proceeding thereupon instituted by the petitioners in pursuance of Article 78 of the New York Civil Practice Act to enjoin the further separate prosecution and trial of their respective indictments was dismissed by the Appellate Division of the Supreme Court on July 11, 1963 (Exhibit B).

The motion by petitioners for Leave to Appeal to the Court of Appeals from the order of dismissal aforesaid was denied by Court of Appeals on October 31, 1963 (Exhibit A).

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S. Code section 1257 (3).

Questions Presented for Review

1. Is Section 813-c of the New York Code of Criminal Procedure as construed to apply to the petitioners unconstitutional as a denial of due process of law and the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States through the incorporation within that section of the combination of the Fourth Amendment with the privilege against self-incrimination contained in the Fifth Amendment?

2. Is Section 813-c of the New York Code of Criminal Procedure as construed to apply to the petitioners unconstitutional as a denial of due process of law and of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment through

its incorporation, relied upon in the premises at all times relevant to this petition, of the privilege against self-incrimination provided by the Fifth Amendment?

3. Has the absence of mandatory jurisdiction in the Court of Appeals for the State of New York to review the exercise of discretion by a Justice of the Supreme Court, who refuses to grant to a defendant the right to inspect the minutes of the Grand Jury, upon which his indictment has been returned, deprived the petitioners under the facts and circumstances of their respective prosecutions herein of the guarantees of due process of law and of the equal protection of the laws provided by Section 1 of the Fourteenth Amendment?

4. Is Article 6, Section 7, of the Constitution of the State of New York unconstitutional *pro tanto* as a denial of due process of law and the equal protection of the laws provided by Section 1 of the Fourteenth Amendment—for the omission from Article 6, section 7 aforesaid of provisions that would constrain the Courts of the State of New York to construe Article 56 of the New York Civil Practice Law and Rules, providing for appeals to the Court of Appeals, and Article 78 of the New York Civil Practice Law, and Rules, providing for the grant of the equivalent of a writ of prohibition, so as to prevent a defendant under indictment from being deprived of his privilege against self-incrimination in connection with his guarantee against the unlawful invasion of the security of his person and an unreasonable search and seizure?

5. Is Article 6, section 7 of the Constitution of the State of New York unconstitutional *pro tanto* as

a denial of due process of law and the equal protection of the laws provided by Section 1 of the Fourteenth Amendment for the omission from Article 6, section 7 aforesaid, of provisions that would constrain the Courts of the State of New York to construe Articles 56 and 78 of the New York Civil Practice Law and Rules aforesaid, so as to prevent a person under indictment from being deprived of his privilege against self-incrimination?

New York State Constitutional Provisions Involved

Article 6, section 7 (relevant portion set out in Exhibit "D").

Statutes Involved

Section 813-c of the New York Code of Criminal Procedure. (The full text is set out in Exhibit "D".)

Article 56 of the New York Civil Practice Law and Rules (relevant portions set out in Exhibit "D").

Article 78 of the New York Civil Practice Law and Rules (relevant portions set out in Exhibit "D").

Statement of the Case

Both of the petitioners were arrested separately prior to or around midnight of January 24, 1963, by officers of the State of New York in the lobby of the apartment house at 2070 Third Avenue, in the City and County of New York, for the alleged violations of the applicable anti-narcotic statute of New York (Section 1751 of the Penal Law).

In each instance, the arrest was made in the absence of a warrant and there were likewise no warrants for the accompanying or incidental searches and seizures. Petitioners claim that they never had any narcotics on their persons nor in their possession and that probable cause was lacking both for their respective arrests and for the accompanying searches and seizures. Before the appearance of the petitioners in the Supreme Court on the following morning, counsel had had no opportunity to confer with them and their arraignment was accordingly waived.

Petitioner, John Miguel, was indicted on the 14th day of March, 1963, for the violation of Section 1751 of the Penal Law of the State of New York for the alleged possession of one-eighth of an ounce of heroin.

Petitioner, Ralph Brown, was indicted on the 6th day of March, 1963, in accordance with the first count for the alleged possession of a quantity of heroin with the intent to sell and in accordance with the second count for the alleged possession of one-eighth of an ounce of heroin.

By separate motions, which were later returnable jointly before Mr. Justice Schweitzer, petitioners moved in the Supreme Court for the State and County of New York in the first place for a Bill of Particulars, which included the demands for the details as to the respective search warrants, secondly for the inspection of the Grand Jury minutes, thirdly, for the suppression of the narcotics and accessories allegedly seized by the arresting officers, and fourthly, for a preliminary hearing upon the issue of probable cause.

In the briefs of the District Attorney submitted in opposition to these motions in the New York Supreme Court, the statement was made in each instance that the search warrants were on record for all the world to see. When investigation made by petitioners' counsel failed to disclose such records, and their absence was called to the attention of the Court during argument on the hearing of the motions, the Assistant District Attorney in charge declared that he had made the aforesaid statements in the briefs as a matter of routine under the rush of business. Although Mr. Justice Schweitzer granted the first item of the Bills of Particulars as to the time and place where the alleged narcotics, and accessories were discovered, he denied the balance of the relief sought in companion opinions printed in Exhibit "C". As that opinion reveals Mr. Justice Schweitzer construed Section 813-c of the New York Code of Criminal Procedure to require the submission by or on behalf of each defendant of an affidavit sufficient to create an issue of fact as to the absence of probable cause for his arrest and the incidental search and seizure. In the case at bar, the petitioners alone are able to provide such affidavits.

Mr. Justice Schweitzer relied further upon the binding authority of an opinion rendered by the New York Court of Appeals vesting in the Justices of the Supreme Court the discretion, the exercise of which remains under all circumstances beyond the jurisdiction of the Court of Appeals to review, whether to permit the inspection of the Grand Jury minutes by or on behalf of an indicted defendant. It was on the basis of his decision dated May 28, 1963, and entered in the

Office of the Clerk of the State Supreme Court for New York County, on May 28th, 1963, that the petitioners brought their joint proceedings in the Appellate Division of the Supreme Court for the equivalent of a Writ of Prohibition in pursuance of Article 78 of the Civil Practice Act against the Justices of the Supreme Court.

The petition sets forth the petitioners' claims that due process and equal protection as guaranteed by the Fourteenth Amendment had been denied to them both through the incorporated guarantees of the Fourth Amendment as combined with the privilege against self-incrimination provided by the Fifth Amendment and likewise upon the principle that the separate incorporation of the last named privilege should be included within the aforesaid guarantees provided by Section 1 of the Fourteenth Amendment.

The proceeding was nevertheless dismissed by the Appellate Division in its order of July 11, 1963 (Exhibit "B").

The motion for leave to appeal to the Court of Appeals from that order was denied on October 31st, 1963 (Exhibit "A").

Reasons Relied Upon for the Allowance of the Writ

A. May an indicted defendant in advance of trial be compelled to furnish evidence which may afford proof to convict him or furnish a state prosecutor with a clue that will form a link in the chain leading to his conviction?

B. May a defendant be placed in the above-described position by an arrest without a warrant accompanied by a search and seizure without a warrant?

C. May a defendant under indictment and before trial be compelled to furnish evidence as a condition precedent for the creation of an issue of probable cause under either or both of the circumstances set forth in immediately preceding questions?

D. May the People of the State of New York deprive an indicted defendant of his right to preliminary hearing upon the question of whether he has been deprived of his constitutional right against arrest and search and seizure in the absence of probable cause as combined with his constitutional privilege against self-incrimination unless he furnishes evidence under oath to raise or attempt to raise that question?

In the role of responsible representation and without extraneous pyrotechniques of affected theatricalities, we submit that the adjective provisions of the Constitution of the State of New York and the pertinent statutes, as construed herein in accordance therewith, present a terrifying retrogression as well as a commensurately grave strangulation at infancy of presently expanding federal constitutional principles. That conservatism is equally as offensive to the guarantee provided by the Fourteenth Amendment of the equal protection of the laws as it is to that of due process of law. That condition of sterility, superimposed by a State Constitution, the relevant judicial article of which antedates the turn of the century, is a ghost that has effectively been exorcised within its own jurisdiction for the state constitutional guar-

antee against double jeopardy by the most recent apposite opinions of the New York Court of Appeals and of the Appellate Division of the First Department.

In *Matter of Nolan* v. *Court of General Sessions*, 15 App. Div. 78 (1st Department—1961), the proceeding was likewise instituted in accordance with Article 78 of the Civil Practice Act, to prohibit the Court of General Sessions of the County of New York, and the District Attorney thereof from retrying the petitioners in violation of the guarantee against double jeopardy, provided by Article 1, section 6 of the New York Constitution. In the order granting the relief sought, the Appellate Division exercised its original jurisdiction by virtue of section 1287 of the Civil Practice Act, now contained as to the provisions pertinent hereto in section 506 (a) (b) (1) of the Civil Practice Law and Rules. Upon appeal by the People as of right under section 588 of the Civil Practice Act (now section 5601 (b) (1) of the Civil Practice Law and Rules), the order was affirmed (*Matter of Nolan* v. *Court of General Sessions*, 11 NY 2nd 114 (1962)).

The grounds for the conclusion therein have more recently been clarified by the reference in *People* v. *Marra*, 13 NY 2nd 409 (June 1963), to the denial of an intermediate attempt by the defense to prevent a retrial in that prosecution through a writ of prohibition brought before the Appellate Division for the Fourth Department. The Trial Court had dismissed the information upon the ground of the insufficiency of the evidence. (*Matter of Marra* v. *County Court of the County of Genesee*, 17 App. Div.

902 (October, 1962)). The Appellate Division in *Marra, ibid*, based its decision refusing prohibition under Article 78 upon a line of New York Court of Appeals opinions which held that the writ can be granted only if the Trial Court were totally lacking in jurisdiction or if the failure to prohibit would leave the applicant without a legal remedy. Actually the Court of Appeals, when the defendant's appeal reached it, reinstated the judgment of acquittal (13 NY 2nd 409, supra). On the contrary, in *Matter of Nolan*, 11 NY 2nd, supra, 119, the Court held that the petitioners, without the necessity for a retrial and appeal after conviction, were entitled to the order, being the equivalent of a writ of prohibition, granted by the Appellate Division. The judgment of that Court was accordingly affirmed by virtue of the guarantee against double jeopardy. The Court of Appeals concluded that petitioners were not to be harassed by a succession of trials. The preventive remedy was made definitively available despite the absence of a final judgment, upon the principle applied in and quoted from *People v. Goldfarb*, 152 App. Div. 870, 874, that the discontinuance by the Trial Court of the prior prosecution was equivalent to a discharge. (11 NY 2nd, supra, 119.) The result was that the writ of prohibition was granted because the Court of General Sessions had become *functus officio*. Therefore the defendants in *Nolan* did not have to await conviction in order to vindicate upon appeal their established constitutional right to discharge forthwith.

Likewise, in the case at bar, the Supreme Court of the State of New York on the one hand, is totally lacking in jurisdiction to place an indicted defendant under oath unless he elects affirmatively to be sworn

with respect to the subject matter of the prosecution and indictment. On the other hand, in sharp distinction to *Nolan*, the Constitutional privilege against self-incrimination of the respective petitioners herein will irretrievably be lost and each petitioner will be left without a legal remedy for its redress either upon his trial or upon his appeal. The necessity for either of these petitioners to furnish the Court with a sworn statement, regardless of its form or nature, that relates to, or is in any manner connected with the subject matter of the indictment or prosecution, destroys the privilege against self-incrimination beyond recall or revival.

The foregoing conclusion is unanswerable in fact and at law as an a fortiori proposition firmly settled by binding authority. In *Matter of Doyle*, 257 NY, 244 (1931), the Court decided that the witness under an investigation authorized by resolution of the Legislature, could not be held in contempt for his refusal to disclose the questions asked when his immunity had not been made so broad that his risk of prosecution was ended altogether (251). That liberality had its source (id.) in the classic pronouncement of this Court in *Counselman* v. *Hitchcock*, 142 US 547 (1892). Under the established precedents of *Counselman* and *Doyle*, which construed the federal and state guarantees against self-incrimination, phrased identically in substance (Fifth Amendment; Constitution of the State of New York, Article 1, section 6), the witness cannot be forced to furnish clues that may supply the links in the chain of proof that might lead to his conviction. (*Counselman* v. *Hitchcock*, 142 US, supra, 564, 565; *Burr's Trial*, 1 Burr's Trial, 244 (1807); *Matter of Doyle*, 257 NY, supra, 251; cf. *Jones* v.

Securities Commission, 298 US 1 (1936). The privilege has invariably been absolute since the late 17th century for a defendant who was being prosecuted (*Counselman* v. *Hitchcock*, supra, 560, 576; VIII Wigmore on Evidence §2250 [McNaughton Rev.—1961]).

That protection, however, could never have been augmented to shield the witness, without a departure by this Court (*Counselman* v. *Hitchcock*, 142 US, supra, 563), from the grammatical reading of the privilege which is literally restricted to the defendant (*Id.*, 563, disapproving *People* v. *Kelly*, 24 NY 74 (1860)).

Nevertheless the witness cannot enjoy the privilege unless he claims it prior to giving an answer that constitutes a waiver thereof, through his admission of guilt or the furnishing by him of clear proof of crime. (*McCarthy* v. *Arndstein*, 266 US, 34 (1924), SC, 262 US 355, 357 (1923); *Arndstein* v. *McCarthy*, 254 US 71, 72 (1920); *id.*, 379, upon reargument, 1920). The privilege exists in civil as well as in criminal proceedings (*Jones* v. *Securities Commission*, *supra*, 298 US 1; *McCarthy* v. *Arndstein*, 266 US, supra, 40). The extension to what was originally decreed as a civil proceeding, was also made by this court in disregard of the literal phraseology of the pertinent clause in the Fifth Amendment (*Boyd* v. *U.S.*, 116 US 616, 633-34 (1886)). That extension is of overwhelming import in its application to the case at bar. It was reached by declaring unconstitutional the compulsory production of documents. This extension combined the privilege of self-incrimination with the guarantee provided by the Fourth Amendment against searches and seizures without probable

cause (*id.*, 633-34-35). That combination has now been made as binding upon the State Courts under the Fourteenth Amendment in criminal prosecutions as it has been, and remains, for prosecutions in the federal tribunals. (*Ker* v. *California*, 374 US 23 (1963)).

Hence, the moment that an indicted defendant is compelled by a State Court to furnish his sworn statement during the course of the prosecution of his indictment, the Court becomes *functus officio*, and the defendant is left without a legal remedy to redress the deprivation of two interrelated constitutional guarantees by having furnished a potential clue for use in the chain of proof that might lead to his conviction. Unlike a witness, an indicted defendant, from the very wording of the privilege in the Constitutions of nation and state, does not have to claim the privilege. The reason is that he cannot be compelled to be a witness without the violation of that clause of the Fifth Amendment (VIII Wigmore, *supra*, section 2250 (McNaughton Rev.—1961)).

The mere threat to make him a witness entitles him to the remedy provided by Article 78 of the Civil Practice Law and Rules in accordance with the equal protection clause of the Fourteenth Amendment. Otherwise, the privilege against self-incrimination in contrast to the guarantee against double jeopardy, is unenforceable under New York Law, which does not even require for its vindication an appeal after conviction. (*Matter of Nolan*, supra, 11 NY 2nd 114). Furthermore, the necessity for the grant of the remedy to preserve the privilege against self-incrimination under Article 78 is increased by the lack of power in the State Courts to confer any immunity upon an

indicted defendant as against the use by the United States or by the State of the coerced evidence (*Knapp* v. *Schweitzer*, 357 US 371 (1958); *Feldman* v. *United States*, 322 US 487 (1944)).

The flagrant unconstitutionality of this application of section 813-c of the New York Code of Criminal Procedure and the outmoded constitutional provisions and statutory regulations that make section 813-c practically invulnerable to correction under its present provisions in the course of litigation of a state prosecution are compounded by the absence of jurisdiction in the New York Court of Appeals to review the exercise of discretion by a Supreme Court Justice in denying to a defendant the right of inspection of the Grand Jury minutes (*People* v. *Howell*, 3 NY 2nd 672, 1958).

The invalidity of section 813-c of the New York Code of Criminal Procedure is further aggravated in the premises by the imposition upon the indicted defendant of the burden of establishing upon the hearing his claim of illegal search and seizure. (*People* v. *Lombardi*, 18 App. Div. 2nd 177 (1st Department) 1963 —, affd —NY 2nd—, November 21, 1963; *People* v. *Entrialgo*, —— App. Div. 2nd — (2nd Department, December 2, 1963 (New York Law Journal, December 13, 1963, front page, col. 1); see also *People* v. *Lopez*, Ibid. col. 7 (App. Div., 1st Department, October 17, 1963). In this situation, the circumstances must be noted that neither in the text of section 813-c of the Code of Criminal Procedure nor in its counterpart in Rule 41-c, of the Federal Rules of Criminal Procedure (*People* v. *Lombardi*, 18 App. Div. 2nd (supra), 181) is there any provi-

sion for an indicted defendant to furnish a statement under oath.

This omission could not have been inadvertent. The judicial gloss for which review by this Court is sought herein is patently and unnecessarily opposed to sound canons of constitutional construction. (*United States* v. *Witkovich*, 353 US 194 (1957). An indicted citizen entitled to protection by virtue of the well settled interpretations of the Bill of Rights throughout the course of his prosecution cannot be compelled to furnish information under oath with reference to the subject matter of the charge against him in the absence of a clear and explicit legislative mandate accompanied by immunity.

That is once more a fortiori conclusion.

This Court has granted to aliens subject to an outstanding final order of deportation dismissal of their indictments for their failure to give information to the Immigration and Naturalization Service as required by section 242 (d) (3) of the Immigration and Naturalization Act of 1952 when the information demanded was other than that which relates solely to availability of the aliens for deportation. (*United States* v. *Witkovich*, 353 US 194 (1957). This restricted reading of an affirmative provision of that congressional enactment was expressly rendered in order to avoid grave issues of constitutionality despite the asserted threat to national security that such observance of constitutional limitations engendered. (Messrs. Justices Clark and Burton, dissenting. *Id.*, 202 et seq., and in *Scutor* v. *Barton*, Ld., 963 (1957).

Consequently, the judicial interpretation placed upon section 813-c of the New York Code of Criminal Procedure in relation to the petitioners herein is in diametric contradiction to the principles surrounding the original retention and progressive enlargement of the privilege against self-incrimination. That privilege has never deviated under American Law from the point to which "Freeborn John" Lilburn directed it by his adamant refusal to take the oath ex officio (*Trial of John Lilburn*, 3 Howell's St. Tr., 1315 (1637); *Trial of Lt. Col. John Lilburn*, 4 Howell St. Tr., 1270 (1649); VIII Wigmore on Evidence, (*supra*, section 2250, p. 282 et seq.) Due Process exacts that it be preserved in all phases its mature significance (*Fay* v. *Noia*, 372 US 391, 414 (1963); citing with approval *Arndstein* v. *McCarthy*, *supra*, 254 US 71).

United States v. *Bufalino*, 285 Fed. 2nd 408 (1960), represents the personal havoc that can be and has been created at wholesale by an over-zealous police officer when his officiousness was subsequently reinforced by futile inquisitions. The right to bail under the Eighth Amendment (*Stack* v. *Boyle*, 342 US 1 (1951)), has never been absorbed within due process as guaranteed by the Fourteenth Amendment (*Palko* v. *Connecticut*, 302 US 319 (1937)). Consequently, with the practical elimination of the privilege of against self-incrimination by the current reading of Section 813-c of the Code of Criminal Procedure, the cognate prohibitions against arrest and search and seizure without probable cause and upon mere suspicion are reduced to a nullity despite *Ker* v. *California*, supra, 374 US 23; *Henry* v. *United States*, 361 US 98 (1959), and *Giordenello* v. *United States*, 357 US 480 (1958).

The citizen's privacy has actually become guaranteeless and the presumption of innocence is left without potency at the police level (Clark, C.J., concurring in *United States* v. *Bufalino*, 285 Fed. supra, 420, and note 3 thereon). Police surveillance and the resulting action based thereon are freed from the initial sanction, despotic and arbitrary though it was, of the superior authority required for the issuance of the infamous lettres de cachet (cf *United States* v. *Innelli*, 226 Fed. 731 (USDC ED—Pennsylvania—1923), as long as Section 813-e of the Code of Criminal Procedure remains invulnerable to attack for unconstitutionality prior to trial despite the judicial gloss of which petitioners complain.

The plight of an indicted defendant thereunder will be still more grotesque whenever *Adamson* v. *California*, 332 US 466 (1947), and *Twining* v. *New Jersey*, 211 US 78 (1908) are overruled for their holding that self-incrimination is not assimilated with due process. The grant of certiorari in *Malloy* v. *Hogan*, 373 US 498, on June 3, 1963, presages that ultimate, if not, prompt, incorporation.

Conclusion

We respectfully submit that no graver invasion of individual privacy and no more serious impairment of the privilege against self-incrimination in its long established connection with the guarantee against search and seizure without probable cause has persisted, or does persist, for review by your Honors. We further doubt that your Honors will permit the survival of the anachronism embodied in the pertinent

provisions of the Constitution and statutes of the State of New York of compelling an indicted defendant prior to trial to submit to a statement under oath which describes his version of his own arrest and of the search and seizure accompanying it as an indispensable condition for obtaining his constitutional right to a preliminary hearing upon the issue of the lack of probable cause. The insulation of state criminal prosecutions under these circumstances involving the right of privacy in its most intimate and immediate form cannot be continued upon the excuse of a fatuous reliance upon an inapposite concept of federalism. The denial by your Honors of preconviction review and correction will in effect destroy the efficacy of the combination of the privilege against self-incrimination with the guarantee against search and seizure without probable cause. The practical effect of a denial of review will render appeal after conviction and the recourse to habeas corpus after the exhaustion of state remedies futile in New York and in all other jurisdictions of the Union, having its outmoded structure for the review of criminal issues.

We pray that Your Honors will grant this Petition for Certiorari.

Respectfully submitted,

FREDERIC A. JOHNSON,
RUDOLPH LION ZALOWITZ,
Counsel for Petitioners.
250 West 57th Street,
New York City, N. Y.

January 4th, 1963

Affidavit of Frederic A. Johnson

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. Misc.

In the Matter of the Application of

JOHN MIGUEL AND RALPH BROWN,

Petitioners,

FOR AN ORDER

against

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AND FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,

Respondents.

Pursuant to Article 78, Civil Practice Act

State of New York,
County of New York—ss.:

FREDERIC A. JOHNSON, being duly sworn deposes and says:

That he has been co-counsel for the petitioners herein since their respective arrests on January 24th, 1963, and has represented them in this proceeding instituted under Article 78 of the New York Civil

Practice Act, and that was continued under Article 78 of the New York Civil Practice Law and Rules, after the effective date of said Law and Rules on September 1, 1963.

That your deponent has been informed by the Office of the Clerk of the New York Court of Appeals that a denial of a motion to appeal means that that Court has jurisdiction over the application and has denied the same in the exercise of discretion, that, on the contrary, a dismissal of a motion to appeal means that the Court does not have jurisdiction over the application.

FREDERIC A. JOHNSON.

Sworn to before me this
7th day of January, 1964

CATHERINE STRAND
Notary Public, State of New York
No. 24-9213000
Qualified in Kings County
Commission Expires March 30, 1964

Exhibit A

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirty-first day of October A. D. 1963.

PRESENT, HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

1 Mo. No. 645

In the Matter of

the Application of JOHN MIGUEL and RALPH BROWN,

Appellants,

for an order

vs.

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, and FRANK S. HOGAN, District Attorney, New York County,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)

Exhibit B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 11th day of July, 1963.

Present—Hon. Bernard Botein,
Presiding Justice
" Charles D. Breitel,
" James B. M. McNally,
" Harold A. Stevens,
" Francis Bergan, *Justices*

6254

In the Matter of the Application of

John Miguel and Ralph Brown,

Petitioners,

for an order

vs.

The Honorable Justices of the Supreme Court of the State of New York, County of New York, and Frank S. Hogan, District Attorney, New York County,

Respondents,

pursuant to Article 78, Civil Practice Act.

The above-named petitioners, John Miguel and Ralph Brown, having presented a petition, verified the 6th day of June, 1963, to this Court, praying for an order prohibiting, enjoining and restraining the respondents and each of them from taking any further steps in the prosecution and trial of petitioners under either Indictment No. 287 for the year 1963 or Indict-

Exhibit B

ment No. 288 for the year 1963 and why these indictments should not be dismissed; or, in the alternative, that the respondents and each of them be prohibited, enjoined and restrained from taking any further steps in the prosecution and trial of the above identified indictments unless and until the respective applications of these petitioners be granted in full for a bill of particulars, for the inspection of grand jury minutes, for the suppression of certain evidence and for a preliminary hearing; and for other relief.

And Hon. Frank S. Hogan, District Attorney, New York County, having appeared herein and having filed a memorandum in answer to said petition, and the said proceeding having duly come on to be heard before this Court on the 14th day of June, 1963; and due deliberation having been had thereon,

Now, upon reading and filing the order to show cause, dated June 7, 1963, with proof of due service thereof, the petition of John Miguel and Ralph Brown, duly verified the 6th day of June, 1963 and the affidavit of Frederic A. Johnson, duly sworn to the 6th day of June, 1963, all read in support of the petition, and the memorandum of Frank S. Hogan, District Attorney, New York County, read in opposition to the application of the petitioners, and after hearing Mr. Frederic A. Johnson in support of the petition, and Hon. Frank S. Hogan in opposition to the application of the petitioners,

It is unanimously ordered that the proceeding be, and the same hereby is dismissed, without costs.

Enter:

VINCENT A. MASSI
Clerk

Exhibit B

CERTIFICATION

APPELLATE DIVISION OF THE SUPREME COURT

FIRST JUDICIAL DEPARTMENT

STATE OF NEW YORK

Clerk's Office

In the Matter of the Application of
JOHN MIGUEL and RALPH BROWN,
Petitioners,

vs.

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, et al.,
Respondents,

pursuant to Article 78, Civil Practice Act.

I, VINCENT A. MASSI, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy ORDER has been compared with the original thereof filed in this office on the 11th day of July 1963, and that the same is a correct transcript thereof, and of the whole of the said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 6th day of January 1964.

VINCENT A. MASSI
Clerk

(Seal)

Exhibit C

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM, PART XXX

Indictment No. 287—63

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN MIGUEL,

Defendant.

SCHWEITZER, *J.*:

The defendant Miguel made a pre-trial omnibus motion which was returnable before this court on April 17, 1963, and counsel for both the People and the defendant were given time to exchange briefs and submit the same to the court. This having been done, the court rendered its decision on the motion on May 2, 1963. Prior to the determination of the motion and unknown to the court, the defendant obtained an order to show cause returnable on May 3, 1963, and said motion was argued on May 7, 1963. Inasmuch as the show cause motion sought the same relief, in essence, as did the prior motion of April 17, 1963, the court stated that the instant application would be considered in the form of a motion to reargue the prior motion and that all the issues set forth in both applications would be considered *de novo*. As a result, the decision dated May 2, 1963 is vacated and the

clerk of the court is directed to make the necessary notations in the court records to that effect.

The defendant, in the instant motion, seeks an order for the following: (1) an inspection of the grand jury minutes; (2) to suppress the evidence presented to the grand jury; (3) a preliminary hearing to show that the source of the evidence, though it may be legal on its face, was illegally obtained; (4) a bill of particulars.

The moving papers are palpably insufficient to establish any basis for a reasonable belief that the evidence before the grand jury was insufficient or illegal (*People* v. *Howell*, 3 N.Y. 2d 672). Therefore, that portion of the motion which seeks an inspection of the grand jury minutes is denied without prejudice to a renewal upon proper motion papers.

The relief sought under items 2 and 3, supra, that is for an order suppressing certain evidence and for a preliminary hearing, is also denied without prejudice to a renewal upon proper motion papers. It has been held generally that for a consideration by the court of this type of relief, there must be raised a factual issue under oath either by the defendant or by such other person having personal knowledge of the facts (*People* v. *Cangiono*, 33 Misc. 2d 23; *People* v. *Mirasola*, 35 Misc. 2d 886). Even if the court were to accept counsel's contention that to require the defendant to execute the affidavit in support of the moving papers is violative of his constitutional rights against self incrimination, nevertheless, the affidavit made by counsel submitted in support of the moving papers relates no facts whatsoever, even hearsay in

nature, to justify the granting of the relief sought herein. The supporting affidavit made by counsel is replete with abstract constitutional concepts and completely ignores the statutory mandate of section 813-c of the Code of Criminal Procedure. It is therein provided that "the court shall hear evidence upon any *issue of fact* necessary to determination of the motion." Since no issue of fact has been raised so as to put in issue the alleged illegality of the defendant's arrest and the alleged concomitant unlawful search of the defendant and seizure of the contraband drugs, then no hearing is required to be held.

The defendant's demand for a bill of particulars is disposed of as follows:

1. Granted, except that the word "exact" is deleted.

2. Denied.

3. Denied.

4. Denied.

Submit order.

May 28, 1963.

Filed

Part 30 May 28 1963

M. D. SCHWEITZER
J. S. C.

Mitchell D. Schweitzer
Justice of the Supreme Court

Exhibit C

SUPREME COURT NEW YORK COUNTY

SPECIAL AND TRIAL TERM, PART XXX

Indictment No. 288-63

THE PEOPLE OF THE STATE OF NEW YORK

—against—

RALPH BROWN,

Defendant.

SCHWEITZER, *J.*:

This is a companion motion to the case of People v. John Miguel which latter motion has been decided simultaneously herewith.

Aside from the fact that no decision had been rendered on the defendant's prior motion returnable April 24, 1963, the court has considered that motion together with the instant order to show cause in deciding the issues. Inasmuch as the moving papers in the companion case encompasses the exact same issues as in the instant case, there appears to be no necessity for repeating the applicable law. It is fully set forth in the companion motion and is equally applicable to the issues raised in the present motion.

Therefore, that part of the motion which requests an inspection of the grand jury minutes and for an order to suppress evidence and for a preliminary hearing is likewise denied without prejudice to a renewal on proper papers.

Exhibit C

The defendant's demand for a bill of particulars is disposed of as follows:

1. Granted, except that the word "exact" is deleted.
2. Denied.
3. Denied.
4. Denied.

Submit order.

Dated: May 28, 1963.

Filed

Part 30 May 28 1963

Mitchell D. Schweitzer
J. S. C.

Mitchell D. Schweitzer
Justice of the Supreme Court

Exhibit D

CONSTITUTION OF THE STATE OF NEW YORK
Article 6, Section 7.

The jurisdiction of the Court of Appeals shall be limited to the review of questions of law except where the judgment is of death, or where the Appellate Division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

Appeals to the Court of Appeals may be taken in the classes of cases hereafter enumerated in this section:

In criminal cases directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or an order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State of New York, or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a

court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the Constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers, or a court, or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6). From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under subdivision (1) of this section where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b); directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

Exhibit D

NEW YORK CODE OF CRIMINAL PROCEDURE.

Section 813-c. The motion in general. 1. A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers, or things hereinafter referred to as property claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The Court shall hear evidence upon any issue of fact necessary to determination of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party. If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction, notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

NEW YORK CIVIL PRACTICE LAW AND RULES.

Section 7801. Nature of Proceeding. Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Whenever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination.

1. Which is not final or can be adequately reviewed

by appeal to a court or some other body—or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioners' application unless the determination to be reviewed was made upon a rehearing, or a hearing had been denied, or the time within which the petitioner can procure a hearing has elapsed.

2. Which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

Section 7804. Procedure (a) Special Proceeding. A proceeding under this article is a special proceeding (b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court, special term, in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

NYCPL & R Article 5—section 506.

(b) Proceeding against body or officer. A Proceeding against a body or officer, shall be commenced in any county within the judicial district where the respondent made the determination complained of.

1. A proceeding against a justice of the supreme court . . . shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable.

Section 7805. Stay. On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination

under review, upon terms including notice, security, and payment of costs, except that the enforcement of an order or judgment granted by the appellate division, in a proceeding under this article may be stayed only by an order of the appellate division or by the court of appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under section 7807.

CPLR Article 56

Section 5601. **Appeals to the court of appeals as of right.**

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the Constitution of the state or of the United States.

Section 5601. **Appeals to the court of appeals by permission.**

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of ap-

peals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direction application:

1. * * *

(i) from an order of the appellate division which finally determines the action which is not appealable as a matter of right, or

Section 5611. **When appellate division order deemed final.**

If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. * * *

Office-Supreme Court, U.S.
FILED
FEB 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 739 [redacted]

IN THE MATTER OF THE APPLICATION OF
JOHN MIGUEL and RALPH BROWN,
Petitioners,

For an Order

against

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, and FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,
Respondents.

Pursuant to Article 78, Civil Practice Act

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
155 Leonard Street
New York, New York 10013

RAYMOND S. HACK

Assistant District Attorneys
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1963

No. 739 Misc.

IN THE MATTER OF THE APPLICATION OF
JOHN MIGUEL and RALPH BROWN,
Petitioners,

For an Order

against

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, and FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,
Respondents.

Pursuant to Article 78, Civil Practice Act

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department

Questions Presented

1. Did the denial by the trial court of petitioners' pre-trial motions to suppress evidence and for a preliminary hearing in regard thereto, on the ground that petitioners failed to raise any issue of fact in their moving papers

deprive petitioners of due process of law and the equal protection of the law in that it required petitioners to incriminate themselves?

2. Should a writ of certiorari be granted where petitioners deliberately avoided a state appellate decision on the merits of their claim?

Summary of Argument

The writ should be disallowed for the following reasons:

1. The authorized mode of review of denials of motion to suppress is by an appeal from conviction [N. Y. Code Crim. Pro. §813-c]. Instead of proceeding to judgment and appealing, petitioners sought to prohibit further prosecution. But a writ of prohibition under New York Law, is not intended as a substitute for appellate review. There is, therefore, no New York appellate ruling on the validity of petitioners' claims. Under such circumstances, discretion should be exercised by this Court so as to deny the petition.

2. The privilege against compulsory self-incrimination embodied in the Fifth Amendment to the United States Constitution does not extend to the States.

3. Merely requiring movants to allege facts in support of their motion to suppress does not impose any unconstitutional burden on defendants. A court in deciding a motion to suppress must know the facts which movants rely upon in support of the relief sought. In the absence of any factual allegations a court is entitled to deny the mo-

tion without a hearing, and without prejudice to renew upon proper motion papers. In so ruling, the trial court followed established federal practice which, in turn, is reflective of normal adversary procedures.

POINT I

The denial by the trial court of petitioners' pre-trial motions to suppress the evidence did not deprive petitioners of due process of law or the equal protection of the law.

The petitioners moved before trial for an order suppressing certain evidence, and for a preliminary hearing to show that the evidence was illegally obtained. The motions were denied, without prejudice to renewal upon proper motion papers, on the ground that neither petitioner had submitted papers raising any issue of fact. Only an affidavit by counsel was submitted, and this related no facts whatsoever.

The essential contention of the petitioners is that the ruling of the trial court would have required them to incriminate themselves, thereby depriving them of the Fifth Amendment protection against self-incrimination as incorporated in the due process and equal protection clauses of the Fourteenth Amendment.

The motions were made pursuant to Section 813-c of the New York Code of Criminal Procedure, which is similar to Rule 41e of the Federal Rules of Criminal Procedure. Both statutes provide that a person aggrieved or claiming to be aggrieved by an unlawful search and seizure may

move the court for the return of the property or for its suppression in evidence. The court is to hear evidence upon any issue of fact necessary for the determination of the motion. The decision of the trial court was based upon the absence of any issue of fact raised by the petitioners' moving papers.

At the outset, it should be noted that this Court has yet to hold that the federal protection against compulsory self-incrimination is applicable to the States through the operation of the Fourteenth Amendment. On the contrary, the Court has specifically denied that the privilege against self-incrimination is included in the concept of due process of law [*Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908)]. Thus, the petition fails to assert any basis for relief heretofore recognized by this Court.

But in any event it is clear that the requirement of raising a factual issue as a condition precedent to the holding of a hearing on a motion to suppress evidence allegedly seized illegally, imposes no burden inconsistent with normal adversary procedures. Granted that the petitioners had "standing" to make the motion in the first instance [see *Jones* v. *United States*, 362 U. S. 257 (1960)], it does not follow that the court must conduct a hearing or grant the motions where the defendants are unwilling to support their motion with evidence [*United States* v. *Viale*, 312 F. 2d 595 (2d Cir. 1963)]. Apprising the court of what this evidence is and thereby enabling the court to determine the merits of the motion, requires that "some evidence of probative value in affidavit form should be pre-

sented before a court is required to entertain the motion" [*United States* v. *Vomero*, 6 F. R. D. 275, 276 (E. D. N. Y. 1946)]. Indeed, the submission of affidavits might well obviate the need for a hearing [*United States* v. *Privinzini*, 6 F. R. D. 207 (S. D. N. Y. 1946)], for where the facts are not in dispute there is no requirement that a hearing be had [*United States* v. *Gross*, 137 F. Supp. 244 (S. D. N. Y. 1956)]. Such proceeding is authorized only where the opposing affidavits pose contested issues of fact [*United States* v. *Martin*, 176 F. Supp. 409 (S. D. N. Y. 1959); *People* v. *Cangione*, 33 Misc. 2d 23 (Queens Co. Ct. 1962); *People* v. *Mirasola*, 35 Misc. 2d 886 (Gen. Sess. 1962)].

It should also be stressed that the petitioners' motions for suppression and for a preliminary hearing in regard thereto, were not denied because petitioners failed to allege ownership or possession of the evidence in question [see *Jones* v. *United States*, *supra*], but solely because they neglected or refused to allege any facts whatsoever in support of the motion. This minimal requirement can hardly be said to contravene established constitutional principles.

POINT II

A writ of certiorari should not be granted where the petitioners deliberately chose a state procedure which avoided a state appellate decision on the merits of their claim.

An additional ground for disallowance of the writ is the failure of petitioners to exhaust or indeed even seek to utilize the state remedies available for the adjudication of the merits of their claim [*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912 (1950)]. An order denying a motion to suppress is appealable from a judgment of conviction [N. Y. Code Crim. Pro. 813-c]. Rather than plead guilty and appeal, or proceed to trial and appeal if convicted, petitioners sought a writ of prohibition pursuant to Article 78 of the New York Civil Practice Law and Rules, 7801 *et seq.*, restraining the Supreme Court of the State of New York and the District Attorney of New York County from proceeding with the prosecution. It is, in fact, the denial of the writ from which petitioners now seek relief in this Court. But a writ of prohibition in New York is "not available ordinarily as a method of premature review" [*Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9 (1946)]; and a denial of the writ is hence not a decision on the merits of the underlying claim.

Petitioners therefore deliberately sought a remedy not intended to reach the merits of their contentions. They cannot now claim that the law governing the granting of writs of prohibition unconstitutionally deprived them of a decision on the merits when they themselves intentionally

chose to avoid such an appellate decision. New York can hardly be faulted for petitioners' choice of an inapposite remedy when the statute which entitled them to move to suppress the evidence also informed them of the proper mode of review.

Petitioners, in effect, are seeking federal intervention at the highest possible level, bypassing entirely the state appellate courts. Granting review at this stage "would expose every State criminal prosecution to insupportable disruption" [*Stefanelli* v. *Minard*, 342 U. S. 117, 123 (1951); *Cleary* v. *Bolger*, 371 U. S. 392, 397 (1963)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 739.

IN THE MATTER

of

The Application of
JOHN MIGUEL and RALPH BROWN,
Petitioners,

FOR AN ORDER

—against—

THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AND FRANK S. HOGAN, DISTRICT ATTORNEY, NEW YORK COUNTY,
Respondents.

PURSUANT TO ARTICLE 78, CIVIL PRACTICE ACT.

PETITION FOR REHEARING OF THE DENIAL OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST JUDICIAL DEPARTMENT.

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To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioners, John Miguel and Ralph Brown, present their petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

Grounds for Rehearing.

The respondents have not made as much as a pretense to refute the undeniable fact that the current construction of Section 813 c of the New York Code of Criminal Procedure requires each of the separately indicted petitioners as a condition for the vindication of his constitutional rights, to furnish evidence in relation to the circumstances of the crime alleged in the absence of immunity so broad that the risk of his prosecution is ended altogether. (*Matter of Doyle*, 257 N. Y. 244, 251 [1931]). This contention of respondents is likewise opposed to *Counselman* v. *Hitchcok*, 142 U. S. 547, 562 (1892).

Respondents' further argument is disingenuous in its assertion that the privilege against self-incrimination is not included in the concept of due process of law. Neither *Adamson* v. *California*, 332 U. S. 46 (1947) nor *Twining* v. *New Jersey*, 211 U. S. 78 (1908), touched even remotely upon the issues involved in the instant petition wherein the claims of privilege against self-incrimination are combined with the guarantee against arrest and search and seizure in the absence of probable cause. Since *Ker* v. *California*, 374 U. S. 23 (1963), self-incrimination has definitely been integrated with the principles of the Fourth Amendment into the warp and woof of due process as provided by

section 1 of the Fourteenth Amendment (*Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Henry* v. *U. S.*, 361 U. S. 98 (1961); *Giordenello* v. *United States*, 357 U. S. 480 (1958); *Albrecht* v. *United States*, 273 U. S. 1, 5 (1927); cf. *Sarafite J. People etc.* v. *Miguel Rivera*, New York Supreme Court, New York County, Volume 149—No. 48 New York Law Journal, p. 15, column 5, 6, 7 (March 12, 1963); Broeder, *The Decline and Fall of Wolf* v. *Colorado* (338 U. S. 25, 1949); 41 Nebraska Law Review 185 (1961): Mr. Justice Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L. Rev. 1, 13 (1960); Fraenkel, Concerning Searches and Seizure, 34 Harv. L. R. 361 (1921).

In the event that the judicial gloss placed upon section 813 c of the New York Code of Criminal Procedure, and evidentally upon Rule 41 e of the Federal Rules of Criminal Procedure as well, necessitates either a statement under oath or testimony from each indicted defendant, who alone as in this proceeding has the information to contradict the arresting officers as to the legality of his arrest, the evolution of the interpretation of the Bill of Rights from *Boyd* v. *United States*, 116 U. S. 616 (1886), to *Ker* v. *California*, *supra*, 374 U. S. 23, has become a nullity to the pre-trial stage where the thrust of that evolution is authoritatively most essential. (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]).

The position of respondents illuminates the prescience of Alexander Hamilton in pointing out that any definition of rights leaves the utmost latitude for evasion (The Federalist, No. 84 at 579 Cook, ed. 1961). In spite of the Ninth Amendment as a reenforcement (Patterson, The Forgotten Ninth Amendment [1955]), the ultimate denial

of certiorari herein means that whereas the privilege against self-incrimination, independently, protects a witness when he is merely potentially subject to indictment, it is unavailing to an indicted defendant in conjunction with the guarantee against arrest and search and seizure for lack of probable cause in the context of due process.

Respondents' arguments are equally fatuous that petitioners have sought to avoid a state decision upon the merits of their claim; that a constitutional remedy exists to establish its merits under State Law; or that the grant of review "would expose every State criminal prosecution to insupportable disruption." In short, the point is that information once disclosed can neither be recalled nor its use thereafter by the prosecution erased.

The library of the Association of the Bar of the City of New York did not receive a copy of the January 1964 issue of the Yale Law Journal, Vol. 73 No. 3, until February 20th, 1964, owing no doubt to its delayed publication. This recognizes that under 28 U. S. C. A., section 1257, "the denial of a prerogative writ by a state court whether or not the writ is ancillary to other litigation is a final judgment." (The requirement of a Final Judgment or Decree for Supreme Court Review of State Courts, 73 Yale L. J. 515, 528.) This line of precedents to this effect (id., note 64) is almost as old as the statutory finality requirement of Section 1257 (id.).

As this recently published comment elucidates, the finality doctrine has been generally relaxed in other aspects (*Local, etc.* v. *Curry*, 371 U. S. 542 (1963); *Mercantile Natl. Bank* v. *Langdeau*, 371 U. S. 555 (1963)). The recognized departure from the original stringent rule of

finality in *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201 (1848), had formerly been restricted to orders directing transfers of property (73 Yale L. J., *supra*, 521 Note 33).

That is of utmost significance in this instance. During the very month that *Weeks* v. *United States*, *supra*, 232 U. S. 383, was decided, the Late Professor Corwin revealed the juristic philosophy of vested rights as the premise for Constitutional law. (The Basic Doctrine of Constitutional Law, 12 Michigan Law Review, 247 (February 1914)): see also, his article referred to therein (id., 276 "The Doctrine of Due Process Before the Civil War", 24 Harv. L. R. 366 [1911]).

The conclusion is therefore plain that self-incrimination cannot in practice, emerge from the influence of the period, when the principal concern of judicial review was the protection of property rights against legislative action, until an indicted defendant may not be forced under oath to speak or divulge facts in writing or otherwise upon seeking to sustain his constitutional guarantees against self-incrimination and illegal arrest within the area of due process. The inconsistency of this outcome under New York Law, in view of the protection awarded thereby to a defendant against police interrogation while being unlawfully detained prior to his indictment, is glaring (*People* v. *Donovan*, 13 N. Y. 2nd 148; 243 N. Y. Supp. 2nd 841 [October 8, 1963]). The inconsistency is equally glaring under federal law through the contrast between the insistence of the 18th century reformers upon the sanctity of the home under the guarantee against unlawful search and seizure, and the current elevation of the dignity of the person in immunizing him from arrest either without cause or

in defiance of constitutional right (Mr. Justice Brennan, dissenting in *Lopez* v. *United States*, 373 U. S. 427, 446 and seq. (1963)). It is submitted that the foregoing contentions have manifestly been strengthened by the disposition of four members of the Court with respect to the Bill of Rights during the recent argument of *Malloy* v. *Hogan* (32 U. S. L. W. 3309).

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department be granted.

Respectfully submitted,

FREDERIC A. JOHNSON,
RUDOLPH LION ZALOWITZ.

Certificate of Counsel.

I, Frederic A. Johnson (Rudolph Lion Zalowitz), counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Counsel for Petitioners.